No. 91-1695

Supreme Court, U.S.
FILED
JUL 30 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1992

PIONEER INVESTMENT SERVICES, COMPANY,
Petitioner,

vs.

BRUNSWICK ASSOCIATES LIMITED PARTNERSHIP, CLINTON ASSOCIATES LIMITED PARTNERSHIP, FT. OGLETHORPE ASSOCIATES LIMITED PARTNERSHIP and WEST KNOXVILLE ASSOCIATES LIMITED PARTNERSHIP,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER

CRAIG J. DONALDSON
Counsel of Record
DENNIS J. O'GRADY
RIKER, DANZIG, SCHERER, HYLAND & PERRETTI
Attorneys for Petitioner
Headquarters Plaza
One Speedwell Avenue
P.O. Box 1981
Morristown, New Jersey 07962-1981
(201) 538-0800

BEST AVAILABLE COPY

2271
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

QUESTIONS PRESENTED

Respondents, claimants in Petitioner's chapter 11 case, received actual notice of the deadline fixed by the bankruptcy court for filing proofs of claim (the "Bar Date") at least three (3) months before the expiration of the Bar Date. Respondents retained experienced bankruptcy counsel and provided him with a complete copy of their file on Petitioner's chapter 11 case, including the written notice of the Bar Date, at least one and one-half (1 1/2) months before the expiration of the Bar Date. Respondents did not file their proofs of claim and they did not file a motion for an extension of time within which to do so before the expiration of the Bar Date. Twenty (20) days after the expiration of the Bar Date, Respondents filed a motion to extend the time to file their proofs of claim. Respondents claimed that their failure to timely file their proofs of claim was the result of excusable neglect. Respondents' claim of excusable neglect was based solely on the ground that their bankruptcy counsel had experienced a disruption in his practice, as a result of his withdrawal from his then firm, and that his file on Petitioner's chapter 11 case was unavailable to him. The questions presented are:

1. Whether the interpretation of excusable neglect, that the failure to timely perform was due to circumstances beyond the reasonable control of the party, which has been adopted and applied by another circuit court of appeals, should be established by the Court as the proper interpretation of excusable neglect under Rule 9006(b)(1) of the Federal Rules of Bankruptcy Procedure.

2. Whether the interpretation of excusable neglect adopted by the United States Court of Appeals for the Sixth Circuit, which conflicts with the decisions of five other circuit courts of appeals because it considers factors other than the Respondents' actions, contravenes the clear congressional intent which requires the filing of a proof of claim within established time limits and precludes

courts from finding exceptions based on general equitable considerations.

3. Regardless of which of the two interpretations of excusable neglect is applied, whether Respondents established excusable neglect, under either interpretation, within the meaning of Rule 9006(b)(1) of the Federal Rules of Bankruptcy Procedure, to allow them to file their proofs of claim after the expiration of the Bar Date, where the uncontroverted facts establish that Respondents' failure to timely file their proofs of claim resulted solely from the negligence of their bankruptcy counsel and his indifference to the Bar Date.

LIST OF PARTIES

The petitioner, Pioneer Investment Services Company, was a debtor-in-possession in a chapter 11 case. The respondents are Brunswick Associates Limited Partnership, Clinton Associates Limited Partnership, Ft. Oglethorpe Associates Limited Partnership, and West Knoxville Associates Limited Partnership, all holders of unsecured pre-petition claims against Pioneer Investment Services Company.

CORPORATE PARTY'S AFFILIATION

Petitioner has no parent companies, subsidiaries (other than wholly-owned subsidiaries) or affiliates.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	iii
Corporate Party's Affiliation	iii
Table of Contents	iv
Table of Citations	vi
Opinions Below	1
Statement of Jurisdiction	1
Statutes and Rules Involved	2
Statement of the Case	4
Summary of Argument	10
Argument:	
I. The Bankruptcy Code And Bankruptcy Rules Require Creditors Whose Claims Are Scheduled As Disputed, Contingent, Or Unliquidated, Or Are Not Scheduled, To File A Proof Of Claim Within Established Time Limits In Order To Participate In A Reorganization	14
A. The Bar Date Prompts Creditors To Act And Promotes Certainty And Finality In Chapter 11 Cases.	16

	Page
B. The Deadline For Filing A Proof Of Claim Must Be Strictly Enforced; Otherwise, The Objectives That Congress Intended To Promote Will Be Destroyed.	20
II. The Holdings Of The Court Of Appeals, That Mere Inadvertence Or Neglect Of Counsel Establishes Excusable Neglect, And That Relief May Be Based On Equitable Considerations, Are Inconsistent With The Decisions Of Every Other Court Of Appeals That Has Considered These Issues.	22
III. The Holding Of The Court of Appeals, That It Is Inappropriate To Penalize A Party For The Neglect Of Its Counsel, Is In Direct Conflict With The Decisions Of This Court.	27
A. A Party Is Bound By And May Not Avoid The Consequences Of The Omissions Of Counsel.	27
B. The Failure To Timely File A Proof Of Claim Is Not Excused By The Creditor's Reliance On Counsel, And Such Reliance Is Not Excusable Neglect For A Late Filing.	29
IV. The Bankruptcy Court Did Not Abuse Its Discretion By Denying Respondents' Motion To File Their Proofs Of Claim Because Respondents Made No Effort To Timely File Their Proofs Of Claim And Such Failure Resulted Solely From The Negligence Of Respondents' Counsel And His Indifference To The Deadline.	31

Conclusion 32

TABLE OF CITATIONS

Cases Cited:

Buckley v. United States, 382 F.2d 611 (10th Cir. 1967) 27

Chisper v. Kohlmeyer & Co., 600 F.2d 1061 (5th Cir. 1979) 24

Davidson v. Keenan, 740 F.2d 129 (2d Cir. 1984) 25

Graham v. Pennsylvania Railroad, 342 F.2d 914 (D.C. Cir. 1964), cert. denied, 381 U.S. 904 (1965) 24

Hoos & Co. v. Dynamics Corp. of America, 570 F.2d 433 (2nd Cir. 1978) 16, 19, 26

In re City of Philadelphia Litigation, 123 F.R.D. 515 (E.D. Pa. 1988) 24

In re Dix, 95 B.R. 134 (9th Cir. B.A.P. 1988) 7, 8, 9, 10, 15, 25, 26, 27, 31

In re Robintech, Inc., 863 F.2d 393 (5th Cir. 1989), cert. denied sub nom., Bullock v. Oppenheim Appel, Dixon & Co., 493 U.S. 811 (1989) 9, 20, 24, 26

In re South Atlantic Financial Corp., 767 F.2d 814 (11th Cir. 1985), cert. denied sub nom. Biscayne 21 Condominium Associates, Inc. v. South Atlantic Financial Corp., 475 U.S. 1015 (1986) 6, 9, 14, 15, 20, 23, 24, 25, 31

In re Vertientes, 845 F.2d 57 (3rd Cir. 1988) 7, 9, 15, 16, 20, 24, 26

Kaercher v. Trustees of Health & Hospital of Boston, 834 F.2d 31 (1st Cir. 1987) 27

Link v. Wabash Railroad Company, 370 U.S. 626 (1962) reh. denied, 371 U.S. 873 (1962) 9, 10, 11, 27, 28, 29

Lujan v. National Wildlife Federation, 497 U.S. 871 (1990) 25

Maressa v. A.H. Robins Co., 839 F.2d 220 (4th Cir. 1988) 7, 9, 20, 21, 24, 26

McLaughlin v. City of LaGrange, 662 F.2d 1385 (11th Cir. 1981), cert. denied, 456 U.S. 979 (1982) 9, 24, 25

Norwest Bank Worthington v. Ahlers, 485 U.S. 197 (1988) 7, 26, 27

Reinsurance Co. of America, Inc. v. Administratia, 808 F.2d 1249 (7th Cir. 1987) 24

650 Park Ave. Corp. v. McRae, 836 F.2d 764 (2d Cir. 1988) 24, 25

Contents

Page

Spound v. Mohasco, Industries, Inc., 534 F.2d 404 (1st Cir. 1976), cert. denied, 429 U.S. 886 (1976) 24, 25

State of Oregon v. Champion International Corp., 680 F. 2d 1300 (9th Cir. 1982) 24, 25

Taylor v. Freeland & Kronz, ___U.S.___, 112 S. Ct. 1644 (1992) 21

United States v. Boyle, 469 U.S. 241 (1985) 11, 21, 29, 30

United States v. Loche, 471 U.S. 84 (1985)..... 21

United States v. Manos, 56 F.R.D. 655 (S.D. Ohio 1972) 28

Statutes Cited:

11 U.S.C. § 341 4

11 U.S.C. § 1111 2

11 U.S.C. § 1111(a).....2, 11, 12, 14, 19

26 U.S.C. § 6651(a)(1) 30, 31

28 U.S.C. § 157 1

28 U.S.C. § 1254(1)..... 2

28 U.S.C. § 1334 1

Contents

Page

Rules Cited:

Federal Rules of Bankruptcy Procedure:

Rule 2002 2

Rule 2002(8)..... 14

Rule 3003 2

Rule 3003(c)(2) 2, 12, 19

Rule 3003(c)(3) 3, 15

Rule 3003(e)(2) 14

Rule 9006 2

Rule 9006(b)(1) .....
.....i, ii, 3, 6, 7, 10, 11, 12, 13, 15, 24, 26, 27, 31

Federal Rules of Appellate Procedure, Rule 4(a)(5) .....
.....22, 23, 24, 25

Federal Rules of Civil Procedure, Rule 6(b)(2) 22, 23, 24

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, entered on September 6, 1991, is reported at 943 F. 2d 674 and is reprinted in the Joint Appendix separately filed ("App.") at 188a. The unreported opinion of the district court, entered on September 12, 1990, affirming the June 8, 1990 decision of the bankruptcy court, is reprinted in the Joint Appendix. App. at 178a. The unreported opinion of the bankruptcy court, entered on June 8, 1990, after remand from the district court, is reprinted in the Joint Appendix. App. at 163a. The unreported opinion of the district court, entered on February 20, 1990, affirming in part, reversing in part, and remanding the matter to the bankruptcy court, is reprinted in the Joint Appendix. App. at 151a. The original opinion of the bankruptcy court is reported at 106 B.R. 510 and is reprinted in the Joint Appendix. App. at 115a. The order of the United States Court of Appeals for the Sixth Circuit denying Petitioner's petition for rehearing is reprinted in the Joint Appendix. App. at 200a.

STATEMENT OF JURISDICTION

Respondents filed their motion to extend the time to file their proofs of claim on August 23, 1989. The bankruptcy court had jurisdiction of Respondents' motion pursuant to 28 U.S.C. § 1334 and 28 U.S.C. § 157. The bankruptcy court conducted an evidentiary hearing on September 14, 1989, and entered an opinion and order denying Respondents' motion on October 10, 1989. Respondents filed a notice of appeal on October 20, 1989. The opinion and order of the United States District Court for the Eastern District of Tennessee, affirming in part, reversing in part and remanding the matter to the bankruptcy court, were entered on February 20, 1990. On remand, the bankruptcy court entered an opinion and order June 20, 1990, *nunc pro tunc* to June 8, 1990, again denying Respondents' motion. Respondents filed a notice of

appeal on June 15, 1990. The opinion and order of the United States District Court for the Eastern District of Tennessee, affirming the June 8, 1990 decision of the bankruptcy court, were entered on September 12, 1990. Respondents filed a notice of appeal on October 10, 1990. The opinion of the United States Court of Appeals for the Sixth Circuit, reversing the September 12, 1990 decision of the district court, was entered on September 6, 1991. On October 28, 1991, the United States Court of Appeals for the Sixth Circuit denied Petitioner's timely petition for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

This case involves 11 U.S.C. § 1111 and Rules 2002, 3003 and 9006 of the Federal Rules of Bankruptcy Procedure.

Section 1111 of the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2579, codified at 11 U.S.C. § 1111(a), provides:

> A proof of claim or interest is deemed filed under section 501 of this title for any claim . . . that appears in the schedules filed under section 521(1) or 1106(a)(2) of this title, except a claim . . . that is scheduled as disputed, contingent, or unliquidated.

Rule 2002 of the Federal Rules of Bankruptcy Procedure provides, in pertinent part:

> Except as provided in subdivisions (h), (i) and (l) of this rule, the clerk or some other person as the court may direct, shall give the debtor, the trustee, all creditors and indenture trustees

> not less than 20 days notice by mail of
>
> * * *
>
> (8) the time fixed for filing proofs of claims pursuant to Rule 3003(c).

Rule 3003(c)(2) and (3) of the Federal Rules of Bankruptcy Procedure provide:

> (2) Any creditor or equity security holder whose claim or interest is not scheduled or is scheduled as disputed, contingent, or unliquidated shall file a proof of claim. . .within the time prescribed by subdivision (c)(3) of this rule; and any creditor who fails to do so shall not be treated as a creditor with respect to such claim for the purposes of voting and distribution.
>
> (3) the court shall fix and for cause shown may extend the time within which proofs of claim. . . may be filed. Notwithstanding the expiration of such time, a proof of claim may be filed to the extent and under the conditions stated in Rule 3002(c)(2), (c)(3), and (c)(4).

Rule 9006(b)(1) of the Federal Rules of Bankruptcy Procedure provides:

> except as provided in paragraphs (2) and (3) of this subdivision, when an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or order of the court, the court for cause shown may at any time in its discretion

> (1) with or without motion or notice enlarge the period if the request therefore is made before the expiration of the period originally prescribed or as extended by a previous order or (2) on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.

STATEMENT OF THE CASE

On April 12, 1989, Petitioner filed its voluntary petition for relief under chapter 11 of Bankruptcy Code, App. at 13a, and a list of its twenty largest unsecured creditors. App. at 19a. This list included all of the Respondents except Ft. Oglethorpe Associates Limited Partnership ("Ft. Oglethorpe"). *Id.*

Petitioner sought and obtained from the bankruptcy court an extension of time through May 17, 1989, within which to file its schedules of assets and liabilities and statement of financial affairs.

On April 13, 1989, the clerk of the bankruptcy court mailed a Notice for a Meeting of Creditors (the "Notice") to interested parties. App. at 29a. The Notice set May 5, 1989, as the date for the meeting of creditors required by 11 U.S.C. § 341 and fixed August 3, 1989, as the Bar Date for creditors to file proofs of claim. *Id.* The notice provided, in pertinent part:

> You must file a proof of claim if your claim is scheduled as disputed, contingent or unliquidated, is unlisted or you do not agree with the amount. See 11 U.S.C. § 1111 and Bankruptcy Rule 3003.

> Bar Date is August 3, 1989.

The first meeting of creditors actually was held on May 19, 1989, and it was adjourned. On May 18, 1989, Petitioner filed its statement of financial affairs and schedules of assets and liabilities. App. at 1a. Respondents were not listed on Petitioner's original schedules. On May 25, 1989, Petitioner filed its amended schedules. App. at 1a. Petitioner did not list Ft. Oglethorpe on its amended schedules, and it listed the claims of the other Respondents as disputed, contingent and unliquidated.

On June 5, 1989, the United States Trustee appointed the Chapter 11 Creditors Committee. One of the Respondents, Clinton Associates Limited Partnership ("Clinton"), was a member of the committee from its inception.

Mark A. Berlin ("Berlin"), an experienced businessman, attorney and certified public accountant, was the president of Robriste Enterprises, Inc., the corporate general partner of all Respondents except Ft. Oglethorpe, and he was the president of Pudding Enterprises, Inc., the corporate general partner of Ft. Oglethorpe. App. at 34a. Prior to May 5, 1989, Berlin received and read the April 13, 1989 Notice for a Meeting of Creditors. App. at 88a-89a.

On June 16, 1989, the adjourned first meeting of creditors was held. Berlin appeared on behalf of all of the Respondents just as he had at the initial meeting of creditors on May 19, 1989. Marc Richards ("Richards"), who was retained as counsel for all of the Respondents in mid-June, 1989, App. at 39a, 83a, also appeared on behalf of all of the Respondents at the adjourned meeting of creditors on June 16, 1989.

Richards was an experienced bankruptcy attorney. App. at 57a-58a. At the time Respondents retained Richards, Berlin provided

Richards with a complete copy of Respondents' file on Petitioner's chapter 11 case. App. at 91a-92a. The file contained the April 13, 1989 Notice for a Meeting of Creditors. App. at 91a. Berlin retained a complete copy of Respondents' file. App. at 92a. Richards reviewed Respondents' file prior to the June 16, 1989 adjourned meeting of creditors. App. at 57a, 143a.

Respondents neither filed their proofs of claim nor a motion for an extension of time within which to do so before the August 3, 1989 Bar Date. On August 23, 1989, twenty (20) days after the expiration of the Bar Date, Respondents filed a motion to extend the time to file their proofs of claim. App. at 31a.

Respondents claimed, in their motion, that their failure to timely file their proofs of claim was the result of excusable neglect. Respondents made only one argument, which focused on their actions and the reasons for those actions, to support their claim. Respondents argument was that Richards had experienced a disruption in his practice in late July, 1989, as a result of his withdrawal from his then firm, and that his file was unavailable to him. App. at 39a, 56a-57a. However, Respondents and Richards failed to explain why Richards simply did not request a copy of the duplicate file from Berlin. App. at 93a.

After an evidentiary hearing, the bankruptcy court held that Respondents had failed to prove excusable neglect within the meaning of Rule 9006(b)(1) of the Federal Rules of Bankruptcy Procedure ("Rule 9006(b)(1)"), and denied Respondents' motion. App. at 115a. The bankruptcy court, relying on the decision of the United States Court of Appeals for the Eleventh Circuit (the "Eleventh Circuit") in *In re South Atlantic Financial Corp.*, 767 F.2d 814 (11th Cir. 1985), *cert. denied sub nom. Biscayne 21 Condominium Associates, Inc. v. South Atlantic Financial Corp.*, 475 U.S. 1015 (1986), held that, in order to establish excusable neglect, Respondents had to prove that their failure to timely file

their proofs of claim was due to circumstances beyond their reasonable control. App. at 128a. The bankruptcy court, relying on the decisions of the United States Court of Appeals for the Third Circuit (the "Third Circuit") in *In re Vertientes*, 845 F.2d 57 (3rd Cir. 1988); of the United States Court of Appeals for the Fourth Circuit (the "Fourth Circuit") in *Maressa v. A.H. Robins Co.*, 839 F.2d 220 (4th Cir. 1988); and, by analogy, of this Court in *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197 (1988), held that an extension of time under Rule 9006(b)(1) could not be granted for equitable reasons such as no prejudice to the debtor and lack of impact on efficient court administration. App. at 131a.

On Respondents' initial appeal to the district court, the district court reversed in part, and held that the more liberal interpretation of excusable neglect, as stated by the Ninth Circuit Bankruptcy Appellate Panel in *In re Dix*, 95 B.R. 134 (9th Cir. B.A.P. 1988), should apply in determining whether Respondents failure to timely file their proofs of claim was the result of excusable neglect. App. at 158a. The district court remanded the matter to the bankruptcy court for reconsideration of Respondents' motion under the more liberal interpretation of excusable neglect, cautioning that the decision of the bankruptcy court would be reversed only for an abuse of discretion. App. at 160a.

On remand, the bankruptcy court applied the undisputed facts of the case to the *Dix* factors and, again, concluded that the Respondents had failed to prove excusable neglect. App. at 163a. The bankruptcy court found that the delay would not prejudice Petitioner, that the length of the delay would not adversely impact efficient court administration, and that Respondents had acted in good faith. App. at 168a, 169a, 170a. However, the bankruptcy court found that the delay was not beyond the reasonable control of the Respondents and that it was appropriate to penalize Respondents for Richards' neglect. App. at 169a, 170a-172a. Finally, the bankruptcy court found that Respondents' failure to

timely file their proofs of claim resulted not only from Richards' negligence, but also from his indifference to the Bar Date. App. at 172a.

The bankruptcy court, after making these findings of fact, concluded that more weight must be accorded to the facts found against the Respondents, stating "For this Court to hold that the partnerships' late-filed claims are to be allowed as timely filed, notwithstanding that both the partnerships and their attorney had actual knowledge of the August 3, 1989 claims' bar date and ample time to file proofs of claims, would render nugatory the fixing of the claims' bar date in this case." App. at 172a173a.

The bankruptcy court, on the issue of whether Respondents should be penalized for Richards' negligence, distinguished the facts of this case from the facts of the *Dix* case. In *Dix*, unlike this case, the creditor did not have actual knowledge of the bar date prior to its expiration. App. at 174a. Also, and perhaps more importantly, the attorney, whose negligence was sought to be attributed to the claimant in *Dix*, was the attorney for the debtor, not the claimant. *In re Dix*, 95 B.R. 134, 139 (9th Cir. B.A.P. 1988).

On Respondents' second appeal to the district court, the district court affirmed. App. at 178a. The district court held that none of the bankruptcy court's findings of fact were erroneous, and that the bankruptcy court's conclusion "was one legitimately within the discretion accorded to the bankruptcy court." App. at 182a.

On appeal, the United States Court of Appeals for the Sixth Circuit (the "Court of Appeals") reversed the decision of the district court, affirming the decision of the bankruptcy court, denying Respondents' motion to file their proofs of claim late. App. at 188a. The Court of Appeals agreed with the district court's conclusion, that the more liberal interpretation of excusable neglect, as stated in *Dix*, should apply, stating ". . . we believe the *Dix* factors should be

applied as aids for case-by-case adjudication, rather than a necessary or complete list of the factors to be considered. App. at 195a.

However, the Court of Appeals reversed the district court's holding that the bankruptcy court did not abuse its discretion in denying Respondents' motion to file their proofs of claim after the expiration of the Bar Date. App. at 196a. The Court of Appeals rested its decision squarely on its conclusion that "it [the Bankruptcy Court] inappropriately penalized the plaintiffs [Respondents] for the errors of their counsel." *Id.* at 196a. The Court of Appeals, solely on the basis of this conclusion, then determined that four of the five *Dix* factors weighed in favor of the Respondents. *Id.* at 198a. The Court of Appeals also held that allowing the Respondents to file their claims late would result in no prejudice to Petitioner. *Id.* at 199a.

On September 20, 1991, Petitioner timely filed its motion for rehearing and its suggestion for rehearing in banc. Pioneer argued that the Court of Appeals' decision, adopting the more liberal interpretation of excusable neglect, as stated in *Dix*, clearly conflicted with the decision of the Eleventh Circuit in *South Atlantic*, and that its consideration of equitable factors, such as no prejudice to the debtor, was in conflict with the decisions of the Third Circuit in *Vertientes*, the Fourth Circuit in *Maressa*, and the United States Court of Appeals for the Fifth Circuit (the "Fifth Circuit") in *In re Robintech, Inc.*, 863 F.2d 393 (5th Cir. 1989), *cert. denied sub nom. Bullock v. Oppenheim Appel, Dixon & Co.*, 493 U.S. 811 (1989).

Pioneer also argued that the Court of Appeals' holding that the bankruptcy court inappropriately penalized Respondents for the errors of their counsel, was, as a matter of law, in direct conflict with the decision of this Court in *Link v. Wabash Railroad Company*, 370 U.S. 626 (1962), *reh. denied.*, 371 U.S. 873 (1962). In *Link*, this

Court held that a party could not avoid the consequences of the acts or omissions of its attorney because "any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.' " *Id.* at 633-634.

Finally, Pioneer argued that the facts of this case clearly were distinguishable from the facts in the *Dix* case. The critical distinction between the *Dix* case and this case is that in the *Dix* case, the attorney, whose negligence was sought to be attributed to the claimant, was not the attorney for the claimant - he was the attorney for the debtor. Understandably, the court in *Dix* held that the claimant should not be penalized for the negligence of the debtor's attorney. Here, however, Richards was not the attorney for the Petitioner, he was the attorney for the Respondents. Accordingly, it was appropriate, as the bankruptcy held, to penalize the Respondents for Richards' negligence.

On October 28, 1991, the Court of Appeals denied Petitioner's motion for rehearing and suggestion for rehearing in banc.

On January 27, 1992, Petitioner timely filed its petition for a writ of certiorari. On June 15, 1992, the Court granted Petitioner's petition.

SUMMARY OF ARGUMENT

The Court of Appeals in this case adopts an interpretation of excusable neglect under Rule 9006(b)(1) which is inconsistent with and does violence to the plain language of the rule. Under Rule 9006(b)(1), a creditor, who has actual notice of the Bar Date and sufficient time to act, but fails to do so, may file a proof of claim, after the expiration of the Bar Date, if the creditor's *failure to act* is

the result of excusable neglect. Contrary to the plain language of Rule 9006(b)(1), the Court of Appeals, in its opinion, focuses on and sanctions consideration of factors other than the creditor's actions and the reasons for those actions, in deciding whether the failure to timely file a proof of claim is the result of excusable neglect. The Court of Appeals holds, in effect, that mere inadvertence or neglect of counsel establishes excusable neglect under Rule 9006(b)(1).

The Court of Appeals unambiguously holds that it was inappropriate for the bankruptcy court to penalize the Respondents for the negligence of their counsel and his indifference towards the Bar Date. Implicit in this holding, are the propositions that a creditor may avoid the consequences of the omissions of the creditor's counsel, and that reliance on counsel is excusable neglect for a late filing of a proof of claim. These holdings are in clear and direct conflict with the holdings of this Court that a party "is deemed bound by the acts of his lawyer-agent . . . ", *Link v. Wabash Railroad*, 370 U.S. 626, 634 (1962), and that ". . . reliance [by a lay person on an attorney] cannot function as a substitute for compliance with an unambiguous statute." *United States v. Boyle*, 469 U.S. 241, 251 (1985).

The precise questions before this Court, therefore, are whether the Court of Appeals erred by holding (i) that mere inadvertence or neglect of counsel constitutes excusable neglect under Rule 9006(b)(1); (ii) that it was inappropriate to penalize the Respondents for the negligence of their counsel; and (iii) that the bankruptcy court abused its discretion by denying Respondents' motion to file their proofs of claim late under the undisputed facts. Petitioner submits that the Court of Appeals erred, and that its decision should be reversed with instructions to reinstate the original memorandum opinion and order of the bankruptcy court.

Section 1111 of the Bankruptcy Code, 11 U.S.C. §1111(a)

("§ 1111(a)") requires creditors, whose claims are listed as "disputed, contingent, or unliquidated," to file a proof of claim before the expiration of the Bar Date in order to participate in a debtor's reorganization. Rule 3003(c)(2) requires such creditors, and those creditors whose claims are not listed on the debtor's schedules, to file their proofs of claim within the time fixed by the bankruptcy court pursuant to Rule 3003(c)(3). Rule 3003(c)(3) clearly and simply provides that the bankruptcy court shall fix the time within which a proof of claim must be filed.

The clear intent of Congress, in enacting §1111(a) and Rule 3003(c)(2), is to require those creditors, who must file a proof of claim, to file it before the expiration of the Bar Date. The Bar Date prompts the creditor to act, and it promotes certainty and finality in chapter 11 cases. Rule 9006(b)(1) authorizes the bankruptcy court, in the exercise of its sound discretion, to allow creditors, who have failed either to timely file a proof of claim or to move for an extension of time within which to do so before the expiration of the Bar Date, to file a claim after the expiration of the Bar Date, only in those rare instances where the creditor's failure to act was the result of excusable neglect. The overwhelming majority of courts which have considered the question have, correctly, strictly construed the term excusable neglect, and they have allowed late filings only where the creditor established that its failure to file timely is due to circumstances beyond its reasonable control.

Contrary to the position urged by the Respondents, and adopted by the Court of Appeals, courts must strictly construe the term excusable neglect, focus only on the actions of the creditor and the reasons for those actions, and allow late filings only in those rare circumstances where the failure to file timely is due to circumstances beyond the reasonable control of the creditor. Courts cannot, as the Respondents urge, and the Court of Appeals holds, excuse compliance with the Bar Date simply because the creditor relies on counsel to comply with the Bar Date, and counsel, because

of mere negligence, fails to do so. To hold, as the Court of Appeals does in this case, encourages creditors and their counsel to have a lax attitude toward the Bar Date, and destroys the objectives of the Bar Date which are to prompt the creditors to act, and to produce certainty and finality in chapter 11 cases.

The bankruptcy court, in its initial memorandum opinion, adopted a strict interpretation of excusable neglect, focused only on the actions of the Respondents, and required the Respondents to establish that their failure to timely file their proofs of claim was due to circumstances beyond their reasonable control. The bankruptcy court properly refused to consider equitable factors, such as no prejudice to Petitioner and the impact on efficient court administration. The bankruptcy court correctly concluded that because Respondents and their counsel had ample notice of the Bar Date and time to act, but failed to do so, the Respondents did not establish excusable neglect. There is no question that the Respondents had actual notice of the Bar Date and sufficient time to file their proofs of claim, that they failed to do so, and that they advanced no reason, other than the negligence of their counsel, for their failure to file timely their proofs of claim.

The Court of Appeals' holdings, that mere negligence of counsel establishes excusable neglect under Rule 9006(b)(1), and that it was inappropriate to penalize the Respondents for the negligence of their counsel and his indifference towards the Bar Date, requires bankruptcy courts to allow untimely proofs of claim whenever any sort of excuse or claim of hardship is offered by a creditor. This result cannot be tolerated because it destroys completely the objectives of prompting parties to act, and producing certainty and finality in chapter 11 cases, all of which Congress intended to promote when it enacted the Bankruptcy Code and the Bankruptcy Rules.

ARGUMENT

I.

THE BANKRUPTCY CODE AND BANKRUPTCY RULES REQUIRE CREDITORS WHOSE CLAIMS ARE SCHEDULED AS DISPUTED, CONTINGENT, OR UNLIQUIDATED, OR ARE NOT SCHEDULED, TO FILE A PROOF OF CLAIM WITHIN ESTABLISHED TIME LIMITS IN ORDER TO PARTICIPATE IN A REORGANIZATION.

The plain language of § 1111(a) requires some, but not all, creditors to file a proof of claim in order to participate in the debtor's reorganization. Section 1111(a) provides that a claim which is listed on the debtor's schedules is deemed filed except for a claim that is scheduled as "disputed, contingent or unliquidated". Rule 3003(e)(2) requires the holders of such claims, and the holders of claims that are not listed on the debtor's schedules, to file a proof of claim in order to participate in the debtor's reorganization. Because Petitioner did not schedule Ft. Oglethorpe's claim, and scheduled the other Respondents' claims "as disputed, contingent, and unliquidated," all of the Respondents were required to file a proof of claim by the Bar Date; otherwise, they were barred from participating in Petitioner's reorganization. *In re South Atlantic Financial Corporation*, 767 F.2d 814, 817 (11th Cir. 1985), *cert. denied sub nom. Biscayne 21 Condominium Associates, Inc. v. South Atlantic Financial Corp.*, 475 U.S. 1015 (1986).

Although § 1111(a) identifies those creditors who must file a proof of claim, it does not specify either the length of notice that must be given to creditors or the time within which the creditor must file a proof of claim. These subjects are addressed by the Federal Rules of Bankruptcy Procedure: Rule 2002(8) requires that

creditors be given not less than twenty (20) days notice by mail of "the time fixed for filing proofs of claim pursuant to Rule 3003(c)". Rule 3003(c)(3), which governs the time for filing a proof of claim in a chapter 11 case, provides that "[t]he court shall fix and for cause shown may extend the time within which proofs of claim or interest may be filed." In this case, the bankruptcy court gave notice by mail to the Petitioner, the Respondents, and all other creditors that August 3, 1989, was the date by which creditors were required to file a proof of claim in Petitioner's chapter 11 case. Because Respondents failed to file their proofs of claim by that date, they were barred from participating in Petitioner's reorganization unless they could establish that their failure to act was the result of excusable neglect. *In re South Atlantic Financial Corporation, supra*, 767 F.2d at 817.

While Rule 3003(c)(3) authorizes the court to extend the time for filing a proof of claim for "cause shown", the authorities hold that this rule must be read in conjunction with Rule 9006 (b)(1). *In re South Atlantic Financial Corporation, supra*, 767 F.2d at 817; *In re Vertientes Ltd.*, 845 F.2d 57, 60 (3rd Cir. 1988); *In re Dix*, 95 B.R. 134, 137 (Bankr. 9th Cir. 1988); *Brunswick Associates Limited Partnership, et al. v. Pioneer Investment Services Company, (In re Pioneer Investment Services Company)*. App. at 192a.

Rule 9006(b)(1) provides, in pertinent part, that "when an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or by order of the court, the court for cause shown may at any time in its discretion . . . (2) on motion made *after* the expiration of the specified period permit the act to be done where the *failure to act* was the result of excusable neglect." (Emphasis supplied). The authorities, consistent with the plain language of Rule 9006(b)(1), unanimously hold that when a party moves for an extension of time *after* the expiration of the specified period, the movant must show that its *failure to act* was a result of excusable neglect. *In re South Atlantic Financial Corp.*,

supra, 767 F.2d at 817; *In re Vertientes, supra*, 845 F.2d at 59; *Brunswick Associates Limited Partnership et al., The Pioneer Investment Services Company, (In re Pioneer Investments Services Company)*. App. at 193a.

Before considering the unsettled question of what elements must be present to constitute excusable neglect, it is first necessary to examine the congressional intent to require creditors to timely file a proof of claim that underlies the provisions of the Bankruptcy Code and Bankruptcy Rules. The determination of what elements constitute excusable neglect under Rule 9006(b)(1) can be made only after the congressional intent is clearly defined and its significance is understood.

A. The Bar Date Prompts Creditors To Act And Promotes Certainty And Finality In Chapter 11 Cases.

The intent of Congress that underlies the Bar Date is readily apparent from an examination of the claims filing process as it existed in cases under chapter XI of the Bankruptcy Act.

In Hoos & Co. v. Dynamics Corp. of America, 570 F.2d 433 (2nd Cir. 1978), the court, in tracing the history of the claims filing process in cases under chapter XI of the Bankruptcy Act, stated:

> Prior to 1963, creditors were not required to file a proof of claim to participate in a chapter XI arrangement. In 1963, a filing requirement was imposed. Chapter XI creditors generally were given only 6 months after the first meeting of creditors to file a proof of claim. Bankruptcy Act 355, Pub. L No. 88 175, § 2, 77 Stat. 330 (1963). This period was extended up to the time of confirmation by the 1967 amending legislation, Pub. L No. 90-156, § 2,

> 81 Stat. 510 (1966), and remains substantially the same for the purposes of this case under current law. See note 16. The purpose of this legislation is explained in the report of the House Committee on the Judiciary:
>
> In 1963, the Congress enacted an amendment to Bankruptcy Act (Public Law 88-175) which required that creditors file their claims in order to participate in distributions under chapter XI of the Bankruptcy Act. It also required that such claims must be filed within 6 months. The 1963 amendment corrected the prior practice of making distribution solely on the basis of the debtor's schedule which had permitted the filing of inflated or fictitious debts. The purpose of the 1963 legislation was to assure that distributions would be made on the basis of a comparative examination of the debtor's schedules with the claims of the creditors. By limiting the time in which creditors could file such claims, the 1963 amendments intended to assure expedition in the administration of chapter XI cases.
>
> The objectives of the 1963 legislation were salutary. However, the committee has learned that the time limitations imposed have created difficulties and confusion where reasonable certainty previously existed. H.R. 2519 retains the objectives of Congress as expressed in 1963 by permitting only those creditors who filed claims to participate under the arrangement. However, in order to avoid imposing onerous and unrealistic burdens on

creditors which may prevent them from participating and thereby provide a windfall or undeserved benefit to the debtor, the bill enables creditors to file their claims up to the date of confirmation.

. . . The principle of the 1963 amendment to chapter XI with respect to filing of creditor claims is retained by the bill. Creditors are still required to file a claim to participate. Two exceptions to the requirement that the claims be filed by the date of confirmation are (1) a claim arising from the rejection of an executory contract of the debtor may be filed within such time as the court may allow, and (2) a claim may be filed late by a creditor - that is, after date of confirmation - is scheduled by the debtor, but in that case shall not be allowed in an amount in excess of that set forth in the debtor's schedules.

H.R. 2519 would restore the laws that existed prior to the 1963 amendment except that it would carry out the Congressional objective of that amendment by requiring every creditor to file a claim before being permitted to participate under a confirmed arrangement. Furthermore, the bill would protect creditors listed on the debtor's schedule who failed to file their claims within the specified period and thus prevent the debtor from obtaining an undeserved windfall. The bill would also protect holders of claims that arise from the rejection of executory contracts.

H.R. Rep. No. 122, 90th Cong., 1st Sess. (1967) (reprinted in S. Rep. No. 751, 90th Cong., 1st Sess. (1967), U.S. Code Cong. & Admin. News 1967, p. 1996, See 9 Collier on Bankruptcy, *supra*, at ¶¶ 7.09[3]-.09[3.1] & 7.25(6).

Id. at 437-438 n. 15.

The court concluded that "[T]his clear Congressional intent to require filing of valid proofs of claim within the time limits that it has set is sufficient to preclude us from finding exceptions to these rules in the supposed interest of equity." *Hoos & Co. v. Dynamics Corp. of America, supra,* 570 F.2d at 439. The court stated further "[T]hus, however much we would like to permit the bankruptcy court to consider in a particular case, including this one, whether it would 'equitable' to permit late filing of a scheduled claim, to do so would put the bankruptcy courts in the unenviable position of indefinitely having to consider claims whenever some sort of excuse is asserted. Such a procedure would destroy the objective of finality which Congress obviously intended to promote." *Id.* at 439.

The decision in *Hoos & Co.* demonstrates that, under the Bankruptcy Act, Congress expressed a clear intent to require creditors to file a proof of claim within the time limits that it established to assure expedition in the administration of chapter XI cases, and to promote certainty and finality.

The plain language of § 1111(a) and Rule 3003(c)(2) show that the congressional intent, to require creditors to file a proof of claim within the time limits that it has set, was carried over to and applies with equal force under the Bankruptcy Code and Bankruptcy Rules.

In cases decided under the Bankruptcy Code and the Bankruptcy Rules, the courts uniformly have recognized the

congressional intent that underlies the Bar Date and its objectives of prompting creditors to act, and producing certainty and finality in the Chapter 11 cases. *In re South Atlantic Financial Corp., supra,* 767 F.2d at 817; *Maressa v. A. H. Robins,* 839 F.2d 220, 221 (4th Cir. 1988); *In re Vertientes, Ltd., supra,* 845 F.2d at 60-61; *In re Robintech, Inc.,* 863 F.2d 393, 398 (5th Cir. 1989), *cert. denied sub nom. Bullock v. Oppenheim, Appel, Dixon & Co.,* 493 U.S. 811 (1989).

B. The Deadline For Filing A Proof Of Claim Must Be Strictly Enforced; Otherwise, The Objectives That Congress Intended To Promote Will Be Destroyed.

While the Court of Appeals in this case acknowledges the intent of Congress and the objectives that it promotes, the Court of Appeals, in the end, completely ignores it. The Court of Appeals rejects the well established proposition that the proper interpretation of excusable neglect is a strict one, and abandons it in favor of an interpretation which encourages a lax attitude toward the Bar Date, and destroys the very objectives which Congress intended to promote.

Although the specific provisions of the Bankruptcy Code and Bankruptcy Rules differ from the provisions of the Bankruptcy Act concerning the time when a proof of claim must be filed, and the creditors who must file a proof of claim in order to participate in a debtor's reorganization, the Bankruptcy Code and the Bankruptcy Act share the same congressional intent that underlies the establishment of a Bar Date and the objectives that it is designed to promote.

The Bankruptcy Code and Bankruptcy Rules, like the Bankruptcy Act and the rules promulgated under it, recognize only one exception to strict compliance with the Bar Date, which is, in those rare instances, where the creditor establishes that the failure to timely file a proof of claim is the result of excusable neglect. As

discussed below, the elements that constitute excusable neglect must focus exclusively on the actions of the creditor and the reasons for those actions, and the interpretation of excusable neglect must be strict. A strict interpretation of excusable neglect reaches the result that Congress intended: it allows the late filing of a proof of claim under extraordinary circumstances where the creditor, through no fault of his own, does not timely file, and, at the same time, it does not allow the objectives that Congress intended to promote to be swept away by a raging and endless stream of vague excuses and supposed claims of hardship.

As this Court recently observed, "[D]eadlines may lead to unwelcome results, but they prompt parties to act and they produce finality." *Taylor v. Freeland & Kronz,* _____U.S._____, 112 S. Ct. 1644, 1648 (1992). While deadlines, like the Bar Date, are arbitrary fixed dates, and have harsh effects, they nevertheless are essential to accomplish a necessary result. *United States v. Boyle,* 469 U.S. 241, 249 (1985). In Chapter 11 cases, the Bar Date prompts creditors to act, or be forever barred from participating in the debtor's reorganization, and it is essential to accomplish certainty and finality. *Maressa v. R. H. Robins Co., supra,* 839 F.2d at 221.

The decisions of this Court establish that if a filing deadline is to have any content, the deadline must be enforced. *United States v. Locke,* 471 U.S. 84, 101 (1985). This Court has expressly held that "[A]ny less rigid standard would risk encouraging a lax attitude toward filing dates." *United States v. Boyle, supra,* 469 U.S. at 249. Accordingly, this Court has not hesitated to enforce filing deadlines because the failure to do so would result "in a cascade of exceptions that would engulf the rule erected by the filing deadline. . ." *United States v. Locke, supra,* 471 U.S. at 101.

The interpretation of the term excusable neglect, which is a limited exception to the absolute enforcement of the deadline created by the Bar Date, must be made with these principles firmly

in mind. The interpretation given to the term obviously must allow for relief in those rare and limited situations where relief is intended. On the other hand, the term cannot be interpreted so liberally that it strips the deadline created by the Bar Date of all content and renders it meaningless. A liberal interpretation, like the one the Court of Appeals adopted in this case, renders the deadline created by the Bar Date nugatory and leads to all of the evils that this Court previously has articulated. Most importantly, it destroys completely the objectives which the deadline of the Bar Date promotes.

Petitioner submits, therefore, that the term excusable neglect must be narrowly and strictly interpreted. A narrow and strict interpretation of excusable neglect preserves the integrity of the deadline created by the Bar Date and promotes the objectives that Congress intended when it enacted the rule.

II.

THE HOLDINGS OF THE COURT OF APPEALS, THAT MERE INADVERTENCE OR NEGLECT OF COUNSEL ESTABLISHES EXCUSABLE NEGLECT, AND THAT RELIEF MAY BE BASED ON EQUITABLE CONSIDERATIONS, ARE INCONSISTENT WITH THE DECISIONS OF EVERY OTHER COURT OF APPEALS THAT HAS CONSIDERED THESE ISSUES.

The decision of the Court in this case has important and far reaching consequences for our system of representative litigation. The term excusable neglect appears not only in Rule 9006(b)(1), but also in Rule 6(b)(2), Federal Rules of Civil Procedure ("Rule 6(b)(2)") and in Rule 4(a)(5), Federal Rules of Appellate Procedure ("Rule 4(a)(5)"). Thus, this Court's interpretation of excusable neglect will govern all situations in bankruptcy cases, civil cases

and appeals, where a party seeks relief from enforcement of a deadline on the claim that the failure to act was the result of excusable neglect.

Because Rule 9006(b)(1), like Rule 6(b)(2) and Rule 4(a)(5), extends the time for the doing of an act where *the failure to act* is the result of excusable neglect, it is obvious that the focus of these rules is on and limited to the movant's actions and the reasons for those actions. The effect that an extension has on the other party is not, as the Court of Appeals holds in this case, a relevant inquiry. If it were, then extensions of time would be granted routinely, and deadlines would not be enforced, where there is no perceived prejudice to the other party, regardless of the reasons for the movant's failure to act.

The bankruptcy court, consistent with the decision of the Eleventh Circuit in *In re South Atlantic Financial Corp.*, held that the respondents had the burden to show that "the failure to timely perform a duty was due to circumstances which were beyond the reasonable control of the person whose duty it was to perform." *In re South Atlantic Financial Corp., supra,* 767 F.2d at 817; *In re Pioneer Investment Services Company.* App. at 128a.

Following the decision of the Eleventh Circuit in *In re South Atlantic Financial Corp.*, the bankruptcy court, in its original memorandum opinion, focused exclusively on the Respondents' actions and the reasons for those actions. The bankruptcy court, after hearing the evidence, concluded that the Respondents' failure to act was not the result of excusable neglect. The bankruptcy court strictly construed the term excusable neglect, and resisted the temptation to grant Respondents' motion on the grounds of general equitable considerations, recognizing that "it cannot judicially expand Rule 9006(b)(1) to add a ground for extending the time to perform an act within a specified period based upon general equitable considerations." App. at 131a.

The correctness of the bankruptcy court's holding, that Respondents had the burden of proof to establish excusable neglect, cannot be questioned. The bankruptcy court's strict interpretation of excusable neglect under Rule 9006(b)(1) is consistent not only with the decisions of the overwhelming majority of the courts which have interpreted the term under Rule 9006(b)(1), but also with the decisions of the courts which have interpreted the term under Rule 6(b)(2) and Rule 4(a)(5). *In re South Atlantic Financial Corp., supra; In re Vertientes Ltd., supra; Maressa v. A. H. Robbins, supra; In re Robintech, supra,* (Rule 9006(b)(1)); *In re City of Philadelphia Litigation,* 123 F.R.D. 515, 520 (E.D. Pa. 1988) (Rule 6(b)(2)); *Chisper v. Kohlmeyer & Co.,* 600 F. 2d 1061, 1065 (5th Cir. 1979); *State of Oregon v. Champion International Corp.,* 680 F. 2d 1300, 1301 (9th Cir. 1982); *Reinsurance Co. of America, Inc. v. Admistratia,* 808 F.2d 1249, 1251 (7th Cir. 1987) (Rule 4(a)(5)).

The bankruptcy court's and the Eleventh Circuit's interpretation of excusable neglect under Rule 9006(b)(1), as requiring the movant to show that "the failure to timely perform a duty was due to circumstances beyond the reasonable control of the person whose duty it was to perform", is consistent with the interpretation given by the courts to the identical term under Rule 6(b)(2) and Rule 4(a)(5). *McLaughlin v. City of LaGrange,* 662 F.2d 1385, 1387-1388 (11th Cir. 1981), *cert. denied,* 456 U. S. 979 (1982); *Graham v. Pennsylvania Railroad,* 342 F.2d 914, 915 (D.C. Cir. 1964), *cert. denied,* 381 U. S. 904 (1965) (Rule 6(b)(2)). The Second Circuit, in interpreting the term under Rule 4(a)(5), held that ". . . a finding of excusable neglect must be based either on the acts of someone other than appellant or counsel, or some extraordinary event." *650 Park Ave. Corp. v. McRae,* 836 F.2d 764, 767 (2d Cir. 1988). *See also, Spound v. Mohasco Industries, Inc.,* 534 F.d 404, 411 (lst Cir. 1976), *cert. denied,* 429 U.S. 886 (1976) ("excusable neglect calls for circumstances that are unique or extraordinary").

All of the courts which have interpreted the term excusable neglect have held, contrary to the holding of the Court of Appeals in this case, that mere inadvertence or neglect of counsel is not excusable neglect. *In re South Atlantic Financial Corp., supra,* 767 F.2d at 818, (Rule 9006(b)(1)); *McLaughlin v. City of LaGrange, supra,* 662 F.2d at 1387; *Davidson v. Keenan,* 740 F.2d 129, 132 (2d Cir. 1984), (Rule 6(b)(2)); *State of Oregon v. Champion International Corp., supra,* 680 F.2d at 1301; *650 Park Ave. Corp. v. McRae, supra,* 836 F.2d at 767 (Rule 4(a)(5)). Indeed, if excusable neglect includes a mere mistake by experienced counsel, "the requirement would be meaningless". *Spound v. Mohasco Industries. Inc., supra,* 584 F.2d at 411.

The undisputed facts of this case show that Respondent's failure to act resulted solely from (i) Richards' negligence and (ii) his indifference to the Bar Date. The holding of the Court of Appeals, that the mere negligence of Richards, an experienced bankruptcy attorney, established excusable neglect, clearly is wrong, and therefore, it must be reversed. Otherwise, the requirement of excusable neglect would be meaningless.

The Respondents had actual notice of the Bar Date and sufficient tlme to act, but failed to do so, only because of Richards' negligence. The decision of this Court in *Lujan v. National Wildlife Federation,* 497 U.S. 871 (1990), strongly suggests, but does not squarely hold, that a party cannot establish excusable neglect under these circumstances. Petitioner urges the Court to so hold now.

The district court and the Court of Appeals reversed the bankruptcy court, and declined to follow what they characterized as the "strict interpretation" of excusable neglect. Instead, the district court and the Court of Appeals adopted the interpretation of excusable neglect stated by the Bankruptcy Appellate Panel of the Ninth Circuit in *In re Dix,* 95 B.R. 134 (Bankr. 9th Cir. 1988). In *Dix,* the court set forth five factors to be considered in deciding whether

the creditor's failure to act was the result of excusable neglect. These factors are:

> (1) Whether granting the delay will prejudice the debtor;
>
> (2) The length of the delay and its impact on efficient court administration;
>
> (3) Whether the delay was beyond the reasonable control of the person whose duty it was to perform;
>
> (4) Whether the creditor acted in good faith; and
>
> (5) Whether clients should be penalized for counsel's mistake or neglect.

95 B.R. 138.

The *Dix* interpretation of excusable neglect is, for two reasons, unacceptable. First, two factors of the *Dix* test, whether granting the delay will prejudice the debtor, and the length of delay and its impact on efficient court administration, are inappropriate because Rule 9006(b)(1) does not grant a court discretion to extend the time to act simply because no prejudice would result, or for any other equitable reason. *Hoos & Co. v. Dynamics Corporation of America, supra,* 570 F.2d at 439; *In re Vertientes, supra,* 845 F.2d at 60; *Maressa v. A. H. Robbins, supra,* 839 F.2d at 221; *In re Robintech, supra,* 863 F.2d at 398; *In re South Atlantic Financial Corporation, supra,* 767 F.2d at 819. Indeed, this Court, speaking in another context, has instructed that "whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code." *Norwest Bank Worthington v. Ahlers,* 485 U.S. 197, 206 (1988).

The Court of Appeals unambiguously holds that, in granting

Respondent's motion, "no prejudice results to the debtor." App. at 199a. The Court of Appeals, unlike the bankruptcy court and every other court of appeals that has considered the issue, has yielded to the temptation to expand Rule 9006(b)(1) to include a ground for granting an extension of time based upon general equitable considerations. Petitioner urges the Court to extend its holding in *Ahlers* to the Bankruptcy Rules, and hold, in this case, that equitable considerations cannot override the plain language of specific Bankruptcy Rules.

III.

THE HOLDING OF THE COURT OF APPEALS, THAT IT IS INAPPROPRIATE TO PENALIZE A PARTY FOR THE NEGLECT OF ITS COUNSEL, IS IN DIRECT CONFLICT WITH THE DECISIONS OF THIS COURT.

A. A Party Is Bound By And May Not Avoid The Consequences Of The Omissions of Counsel.

The *Dix* test also is unacceptable because the fifth factor, whether clients should be penalized for counsel's mistake or neglect, must always be found against the movant. Under the decision of this Court in *Link v. Wabash Railroad,* 370 U.S. 626 (1962), *reh. denied,* 371 U.S. 873 (1962), the client, in our representative system of litigation, always is bound by the omissions of its counsel and cannot avoid them.

The decision of the Court of Appeals, that Respondents should not be penalized for the negligence of Richards, directly conflicts with the decision of this Court in *Link v. Wabash Railroad Company,* and the decisions of other courts which have understood the holding in *Link,* and faithfully followed it. *Kaercher v. Trustees of Health & Hospital of Boston,* 834 F.2d 31, 34 (1st Cir 1987); *Buckley v. United States,* 382 F.2d 611, 615 (10th Cir. 1967); *United States v. Manos,*

56 F.R.D. 655 (S.D. Ohio 1972).

In *Link*, the district court *sua sponte* dismissed plaintiff's diversity negligence action against the defendant. 370 U.S. at 627. The district court notified counsel for plaintiff and defendant of the scheduling of a pre-trial conference to be held on a date and time certain. *Id.* at 627. On the day of the pretrial conference, plaintiff's counsel did not appear. The district court dismissed the action. *Id.* at 628-629. The court of appeals affirmed. *Id.* at 629. This Court, in affirming the decision of the court of appeals, affirming the district court's dismissal of the action, stated:

> There is certainly no merit to the contention that dismissal of Petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of his freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.'

Id. at 633-634.

In this case, the Court of Appeals expressly held that "it [the bankruptcy court] inappropriately penalized the plaintiffs [Respondents] for the errors of their counsel." App. at 196a. This holding is in direct conflict with the holding of this Court in *Link*. Indeed, in view of decision of this Court in *Link*, it was not only appropriate, but also mandatory, for the bankruptcy court to penalize the Respondents for the negligence and indifference of Richards.

The decision of the Court of Appeals reaches a result which this Court, thirty (30) years ago, in *Link*, prohibited, *i.e.*, visiting the sins of Respondents' counsel upon the Petitioner. 370 U.S. at 634. As this Court stated in *Link*, if counsel's conduct falls substantially below what is reasonable under the circumstances, the client's remedy is against the attorney in a suit for malpractice. 370 U.S. at 634. Respondents have exercised their remedy by filing a malpractice action against Richards. App. at 134a. To afford Respondents the additional relief, as the Court of Appeals would do, of being able to file their proofs of claim late, affords relief to Respondents which this Court already has held they are not entitled to receive.

B. The Failure To Timely File A Proof Of Claim Is Not Excused By The Creditor's Reliance on Counsel, And Such Reliance Is Not Excusable Neglect For A Late Filing.

The Court of Appeals found "that the partnerships [Respondents] in all likelihood relied on the expertise of their experienced bankruptcy counsel and paid no further heed to the matter." App. at 196a-197a. This holding clearly suggests that Respondents failure to timely file their proofs of claim is excused by their reliance on counsel, and that such reliance is excusable neglect for their failure to act. This holding directly conflicts with the decision of this Court in *United States v. Boyle*, 469 U.S. 241 (1985).

In *Boyle*, the executor of an estate retained counsel for the estate. 469 U.S. at 242. The executor relied on the attorney. *Id.* at 242. The executor contacted the attorney to inquire about the preparation of the estate tax return, and was assured by the attorney that it would be filed "in plenty of time". *Id.* at 243. After the deadline to file passed, the executor learned for the first time that the estate tax return was overdue. *Id.* at 243. The deadline was missed because of a clerical oversight in the attorney's office. *Id.* at 243.

The Internal Revenue Service assessed a penalty for the late filing under 26 U.S.C. § 6651(a)(1). *Id.* at 243. The executor claimed that the penalty was unjustified because his failure to file was "due to reasonable cause," *i.e.*, reliance on the attorney. *Id.* at 244. This Court, in reversing the decisions below, that reliance on the attorney was "reasonable cause", stated:

> To say that it was "reasonable" for the executor to *assume* the attorney would comply with the statute may resolve the matter as between them, but not with respect to the executor's obligations under the statute . . . that the attorney, as the executor's agent, was expected to attend to the matter does not relieve the principal of his duty to comply with the statute.

(Emphasis in original). *Id.* at 250.

This Court held:

> It requires no special training or effort to ascertain a deadline and make sure that it is met. The failure to make a timely filing of a tax return is not excused by the taxpayer's reliance on an agent, and such reliance is not "reasonable cause" for a late filing under 6651(a)(1). . . .

Id. at 252.

The holding of this Court in *Boyle* cannot be reconciled with the holding of the Court of Appeals in this case. That Richards, Respondents' counsel, was expected to file the proofs of claim does not relieve Respondents of their duty to comply with the Bar Date. Respondents were aware of the Bar Date. App. at 88a-89a.

Respondents failure to timely file their claims cannot be excused by their reliance on Richards, and such reliance is not excusable neglect. This is especially true in this case because "reasonable cause" under 26 U.S.C. § 6651(a)(1) obviously is a less exacting standard than "excusable neglect" under Rule 9006(b)(1).

IV.

THE BANKRUPTCY COURT DID NOT ABUSE ITS DISCRETION BY DENYING RESPONDENTS' MOTION TO FILE THEIR PROOFS OF CLAIM BECAUSE RESPONDENTS MADE NO EFFORT TO TIMELY FILE THEIR PROOFS OF CLAIM AND SUCH FAILURE RESULTED SOLELY FROM THE NEGLIGENCE OF RESPONDENTS' COUNSEL AND HIS INDIFFERENCE TO THE DEADLINE.

Regardless of which interpretation of excusable neglect this Court adopts, the decision of the Court of Appeals must be reversed with instructions to reinstate the judgment of the bankruptcy court and district court denying Respondents' motion to file their claims out-of-time. Under the interpretation of excusable neglect set forth in *In re South Atlantic Financial Corp.*, Respondents failed to advance any reason for failing to comply with the August 3, 1989 Bar Date that was not within their reasonable control.

Even if the interpretation of excusable neglect set forth in the *Dix* case is followed, the decision of the Court of Appeals nevertheless is erroneous and must be reversed. The only reason Respondents advanced for their failure to timely file their proofs of claim was the failure of their counsel to determine the Bar Date and to file their proofs of claim before the expiration of the Bar Date. Respondents and their counsel could have verified easily, by examination of the docket in the bankruptcy court, the Bar Date.

App. 24a. Moreover, the business representative of the Respondents, Berlin, and Respondents' counsel, Richards, both had possession of the Notice of Meeting of creditors that fixed the Bar Date and they had read it. App. at 29a, 57a, 143a. Under these circumstances, the Court of Appeals could not have found, properly, that the bankruptcy court abused its discretion in refusing to allow Respondents to file their proofs of claim after the expiration of the Bar Date.

CONCLUSION

For the above reasons, Petitioner urges this Court to reverse the Court of Appeals and reinstate the judgment of the bankruptcy court in favor of Petitioner.

Respectfully submitted,

CRAIG J. DONALDSON
Counsel of Record
DENNIS J. O'GRADY
RIKER, DANZIG, SCHERER,
HYLAND & PERRETTI
Attorneys for Petitioner
Headquarters Plaza
One Speedwell Avenue
P. O. Box 1981
Morristown, New Jersey 07962-1981
(201) 583-0800